AN INTERESTING CASE

Being an Account of the Legal Controversy Over the Will of

BENJAMIN VAN CLEVE

A Soldier of the Revolution

Twenty-one Years a Member of the Legislature and
Three Times Speaker of the Assembly, etc.
Together with an

APPRECIATION OF THE TESTATOR

by

His great-great grandson
EDWIN ROBERT WALKER
Chancellor of New Jersey

Being a Lecture Delivered Before the
TRENTON HISTORICAL SOCIETY,
in the Armory of the
OLD BARRACKS, AT TRENTON NEW JERSEY
May 19th, 1927

Picture of Van Cleve House as It Now Exists, 1927.

The above is a view of the house built by Major Benjamin Van Cleve some time prior to the year 1798, and enlarged and repaired before the Civil War by the late Benjamin C. White, who owned the premises for many years. Its distance from the Trenton Battle Monument by way of Brunswick Avenue, out Lawrenceville Road, the only one said to be open during the Revolution, is 4.2 miles; from the Battle Monument, out Princeton Pike and to the left at Harney's Corner, over the Lawrenceville Road, is 4 miles. See also *post* page 9.

GENEALOGY

Descent of the Author
From the Testator (1)

(1) Benjamin Van Cleve of Lawrence — *married* — Mary Wright of Trenton

Their Son

(2) Joseph W. Van Cleve of Lawrence — *married* — Charity Pitney of Morristown.

Their Daughter

(3) Mary W. Van Cleve of Lawrence — *was married to* — Stacy A. Paxson of Trenton

Their Daughter

(4) Mary W. Paxson of Trenton — *was married to* — Walter Walker, M. D. of Rochester

Their Son is

(5) EDWIN ROBERT WALKER
The Author

AN APOLOGY.

Mr. President and Gentlemen:

My excuse for composing the following is a more or less insistent request to do so from various friends to whom I have told the story in outline at various times.

It is an account of the legal controversy over the will of Benjamin Van Cleve, great-great grandfather of the author, a soldier of the Revolution, one who enjoyed longer service in the Legislature of this State than any other, and was Speaker of the Assembly three several times.

It is a very interesting case. The report of the proceedings in the New Jersey Supreme Court occupies 101 pages (695-796) in 2d Southard's Law Reports, edition of 1886. It commences at page 589 of the first edition of 1820.

The second trial, which occupied the attention of Judges Bushrod Washington and William S. Pennington, in the Circuit Court of the United States for the District of New Jersey, commences on page 262 in 4th Washington's Circuit Court Reports. The case was decided in favor of Joseph W. Van Cleve, the defendant, in the New Jersey Supreme Court, in the ejectment suit, on the finding in his favor by a struck or special jury. Afterwards a rule to show cause, obtained by the plaintiffs, was discharged, the vote in the defendant's (Joseph W. Van Cleve's) favor being two to one in the Supreme Court on the question of a new trial. Later, in the United States Circuit Court the verdict of the jury was in favor of the defendant; and the cause then concluded.

Thus ended in the complete triumph of Joseph W. Van Cleve all the litigation that was waged over his father's estate; and that by his sisters, who desired each to have the will set aside and inherit as heirs at law (along with himself) shares of one-third each. And this litigation, continuing in two courts for several years, and considering the eminence of the counsel involved, cost Joseph W. Van Cleve his farm at Lawrence, thus acquired, and soon after the ending of the suits it passed out of the family. The questions of fact involved in the litigations, and the law arising upon those facts as therein decided,

will, in the progress of this account, be more fully told. I incline to think that those who hear me, or later read this paper, will be convinced that this is an interesting case. There are several questions of law arising on these records which I would, as a lawyer, like to discuss; but, owing to the great length of this paper I will refrain.

Lest it might be thought by some that this review of the cases had been prepared over night, I beg leave to say, or rather confess, that it has been the work of several years, on and off, with, of course, long periods of inactivity between matters of research and jotting down sundry disjointed and fragmentary items.

The preparation of this paper has been a labor of love, both for family and for legal reasons, all of which has well repaid me; and if I have written aught that interests the public generally, I have succeeded beyond my expectations.

AN APPRECIATION

Benjamin Van Cleve was no ordinary man, but one of prominence and popularity in his day and generation. He was born at Maidenhead, now Lawrence, September 30, 1739. He was twice married, first to Mary Wright (1765), daughter of Joseph Wright; and after her death to Mrs. Anna Green (1786), daughter of Rev. Caleb Smith, and widow of George Green. Both wives predeceased him. He died August 31, 1817, aged nearly seventy-eight years. He left him surviving children by his first wife only. They were his son, Joseph W. Van Cleve, who died in Trenton in 1864, and his daughters, Phebe, wife of Major John Stevens, and Elizabeth, wife of Dr. Israel Clarke.[1] The children engaged in a fierce contest over the will of their father, which engrossed the attention of the Supreme Court of New Jersey and the United States Circuit Court for this State, and was a matter of much public interest hereabouts at that time.

Benjamin Van Cleve was thirty-six years of age when the Revolutionary War broke out. He became a first-lieutenant, first regiment, Hunterdon County Militia, Heard's Brigade; afterwards a captain in Colonel Johnson's Battalion, same

[1] Van Cleve Family Bible; also N. J. Archives, 2 Series, Vol. 3, p. 485.

brigade; and later, second major, same regiment.[2] While a captain in the militia he commanded a company at the battle of Long Island, August 27, 1776.[3] He resigned from the army to become a member of the Legislature, being elected to the House of Assembly in 1777, as the successor of John Hart, deceased, of Hopewell, a Signer of the Declaration of Independence. The countryside which included Lawrenceville being then in Hunterdon; Mercer County was not created until 1838.

Major Van Cleve enjoyed the longest service in the New Jersey Legislature of anyone since the adoption of the Constitution of 1776. He was elected to the House of Assembly in 1777, 1778, 1781, 1782, 1783, 1784 (Speaker to fill a vacancy), 1785, 1786 (Speaker), 1787, 1788 (Speaker), 1791, 1792, 1793, 1795, 1796, 1797, 1798, 1800, 1801, 1802, being twenty years; and one year, 1789, in the Council, now the Senate, making twenty-one years in all.[4] He was, besides a member of the Legislature, a judge of the Hunterdon County Court of Common Pleas, being elected by the joint meeting of the two houses of the Legislature December 18, 1782.[4]

He was also a justice of the peace for the county of Hunterdon for the years 1776 to 1801, resigning November 20, 1801.[5] He resigned November 20, 1801.[6]

Benjamin Van Cleve held several other minor offices, namely, Freeholder, in 1775, and member of the Township Committee 1774 to 1776 and in 1802, and was Clerk of the Board of Chosen Freeholders of Hunterdon County in 1791.[7]

The office of justice of the peace is ancient, and in the days when Major Van Cleve served in that capacity in Hunterdon it was an honorable one. It had not sunk so low then as in later years, when, I regret to say, some of the incumbents were ignorant and corrupt. In the olden days, under the Constitution of 1776, when the justices were elected by the joint

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[2]Muster Rolls, Adjutant General's Office, Trenton; Year Book of Sons of the Revolution, 1925.

[3]Year Book, Sons of the Revolution; Minutes of Council of Safety, p. 181; Den v. Van Cleve, 2d Southard's New Jersey Law Reports, Testimony of Henry Cook at p. 717.

[4]Minutes of the Council, 1789; Minutes of Assembly, 1777-1802; Fitzgerald's Legislative Manual, 1926, pp. 143, 167. Minutes of the Joint Meeting, 1782.

[5]Minutes of Joint Meeting 1176, 1781, 1786, 1791, 1796, when he was elected for terms of five years each.

[6]Miscellaneous [illegible] No. 223, Office of the Secretary of State.

[7]Minutes of the Board for those years, and N. J. Archives, 2d Series, Vol. 3, p. 735, note 1.

meeting of the two houses of the Legislature, they were for the most part men of high standing, integrity and ability. And such was Benjamin Van Cleve.

The office of justice of the peace is one of the oldest known to the English law. *Bouvier's Law Dictionary (Rawle's 3d rev.), Vol. 2, page 1797.* And the learned author says:

> "A new class of officials was appointed in England in 1327 especially entrusted with the conservation of the peace. Later they were allowed to receive indictments and to send those indicted for trial to the justices of gaol delivery. In 1341 they were to hear and determine felonies and trespasses. In 1360 they were assigned to every county in England, one lord and three or four of the most worthy in the county, with some learned in the law, to keep the peace, to arrest and imprison offenders, to imprison and take surety of suspected persons and to hear and determine felonies and trespasses; and were, about this time, styled by their present name. The number varied. By one act they must be the most sufficient knights, esquires and gentlemen of the land; by another, residents in their counties. They were appointed by the crown. They were the permanent rulers of the county. More recently their administrative powers had been given to elective boards. They were subject to the control of the courts of common law by means of the prerogative writs; by certiorari, their decisions can be questioned, and by mandamus they can be ordered to hear a case falling within their jurisdiction."

In England today gentlemen of the highest rank in the various counties are appointed justices of the peace, many of them being members of Parliament, some peers of the realm.[8]

LA FAYETTE'S FIRST VISIT

On the occasion of his first visit to the United States after the Revolutionary War, the Marquis de La Fayette came to Trenton. He arrived here from Philadelphia on November 10, 1784, and on the 11th the Legislature presented him with

[8] See Burke's Peerage, any edition.

an address extolling his sacred regard for the rights of mankind which moved him to voluntarily engage in the hazardous cause of America, acknowledging with gratitude the signal services which he rendered this and the other States of the Union, which greatly contributed to the complete establishment of the freedom and independence which they then enjoyed. The address ended thus:

> "Permit us, Sir, to conclude with expressing our fervent wishes for your welfare and prosperity, and with assuring you that the citizens of New-Jersey will ever retain an exalted sense of your disinterested friendship and important services.
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> Council Chamber, December 11th, 1784. By order of the Council, Wil. Livingston, *President.*
>
> House of Assembly, December 11th, 1784. By order of the House, Benj. Van Cleve, *Speaker.*"

The noble Marquis fittingly replied to this address of the two Houses of the Legislature.[9]

After his last term in the House of Assembly, and in 1803, Major Van Cleve appears to have retired from public life, having resigned his office of justice upwards of a year before, and devoted himself to life upon his farm, among his family, his neighbors and his personal friends.

While not learned, Benjamin Van Cleve was not unlettered. He doubtless had the usual education of a gentleman who cultivated the soil (a very usual occupation of a gentleman at that time); he wrote a good hand and his signature was firm and well executed. I have seen many specimens of it; notably on legislative bills, which he certified had passed the House when he was Speaker. And he was a friend and patron of learning. This is apparent from his conversation detailed by the witness Roberts, who had some talk with him on the subject. He had sent his son John, then dead, through Princeton College, and he afterwards became a member of the Bar.

To show the difference between newspaper reporting in the early days and these, it is only necessary to say that when this soldier of the Revolution, who had been twenty-one years a

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[9]The *New Jersey Gazette*, Monday, December 27, 1784; Raum's History of Trenton, Vol. 2, p. 275. Governor Livingston was president of the Council under the Constitution of 1776. See Article VIII.

member of the Legislature and three times Speaker of the House and held other public offices, died, only meagre mention was made of the fact, and practically nothing of his public services, in the newspapers, the *Trenton Federalist*, September 8, 1817, simply saying:

> "Died—In the same township (Lawrence) on the 29th ult. Benjamin Vancleve, Esq., aged 78 years, formerly and for many years a Member of the Legislature, for the county of Hunterdon."

The public press in those days consisted principally of a foreign letter, a rancorous political editorial, and advertisements. There was practically no local news, because there were no local reporters. Nor was there any occasion for them. Everybody knew what was transpiring in their localities. Besides, there were some inaccuracies, as Benjamin Van Cleve died August 31, not August 29th, and was aged 77, and not 78 years, as reported.

Den v. *Van Cleve* was the title of the case which concerned the validity of the will of Major Van Cleve. It is very interesting, and was tried at the November term of the Supreme Court at the State House, in 1818. The narrative, in the hands of an artist, could well be made the theme of a novel or a drama. The prominence of many of the actors, and the dramatic effect of death-bed scenes and courtroom actions, combine to speak unusual human interest.

The case was before Chief Justice Kirkpatrick and Justice Southard, Justice Rossell not sitting. The trial was at the bar of the court and by a struck jury. A trial at bar differed from a trial at circuit in this: The case being one of importance, the court itself—that is, all the Judges, or a quorum of them—sat and presided over the trial. Ordinarily the Judges of the Supreme Court went into the various counties and sat for the trial of jury cases. These were known as trials at circuit. But, where the amount or value of the property in controversy exceeded $3.000.00 and there were numerous and complicated questions of law, applications for trial at bar were frequently granted, in which event the trial was had before the Supreme Court sitting *in banc* and a jury, usually at Trenton. Sitting *in banc* means a sitting of all the judges, or a quorum of them,

instead of a single judge sitting at circuit. The Van Cleve will case was one eligible to be tried at the bar of the Supreme Court, and, on application therefor, that sort of trial was granted.

The law for trial at bar still exists, but probably no civil suit has been tried at bar in a jury case for nearly one hundred years, the last reported one that I have found in which such a trial took place, was in *State Bank* v. *Evans, 14 New Jersey Law Reports, page 298* (*1834*), ninety-three years ago.

Special or struck juries were introduced in trials where the causes were of too great nicety for ordinary or common juries. They were obtained by application to the court, and, if granted, a judge selected forty-eight names of eligible jurors, from which the attorney on each side struck twelve, or twenty-four in all, and the remaining twenty-four were returned for the trial, out of which the twelve jurors for the trial were drawn and sworn or affirmed. The pleadings being at an end, and the issue ready for trial, the court issued what is called a *venire*, which is a writ, literally, "that you cause to come," meaning a writ of *Venire facias juratores,* called *venire* simply.[10] In this case the court issued a writ on parchment as then usual, directed to the sheriff of the county of Hunterdon, commanding him to cause to come before the Supreme Court at Trenton the persons named in the annexed list or panel subscribed by Mr. Justice Southard (the struck jury). In obedience to the writ, Sheriff John Cavanagh, of Hunterdon, returned that he had summoned the list of jurors as commanded. Their names and residences in the list are as follows:

Amwell

1. Samuel Barber, Esq.
2. Dr. John Browne
3. John Carr, Esq.
4. Col. Abm. R. Sutphin

Hopewell

5. Joshua Bunn
6. David Stout, Esq.

Trenton

7. Israel Taylor, Esq.
8. Thomas C. Sterling.

Kingwood

9. Col. John Britton
10. George Larison, Esq.
11. Rich. Opdycke, Esq.
12. Edward Welstead
13. John Waterhouse

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[10] Bouvier's Law Dictionary (Rawle's 3d rev.), Vol 3, page 3390.

Readington

14. George W. Farlee
15. Peter Quick

Bethlehem

16. Philip Johnston, Esq.
17. George Maxwell, Esq.
18. Banjamin Egbert, Esq.

Lebanon

19. Col. Isaac C. Farlee
20. Joseph Johnson, Esq.

Alexandria

21. John Opdycke, Esq.
22. Richard Gano, Esq.
23. Col. David Everitt
24. Paul H. M. Prevost, Esq.

The twelve jurors accepted, chosen, tried and sworn or affirmed to well and truly try the cause and a true verdict render, were as follows:

Samuel Barber, sworn
John Carr, sworn
Joshua Bunn, sworn
Israel Taylor, affirmed
Thomas C. Sterling, affirmed
Col. John Britton, sworn
George Larison, sworn
Richard Opdycke, sworn
Edward Welstead, sworn
John Waterhouse, sworn
Peter Quick, sworn
Richard Gano, sworn[11]

The names of the jurors and witnesses summoned in the Van Cleve cases are given because descendants and other relatives may still reside in the vicinity of Trenton, and may recognize them.

It will be interesting to note that the word "panel," of which you have all heard so much, comes from the fact that the names of the jurors were written on a paper shaped like a *panel,* and attached by the sheriff to the writ of *venire* and returned by him. Hence the words "panel of jurors." Another thing: "Talesmen," from the Latin *Talis* (such like) of which you have heard so much, simply means that after a panel has been exhausted, by challenge or otherwise, additional jurors are summoned hastily from the bystanders, and their names are, or were, written on the paper at the "tail end" of the panel.

The controversy in this case was over a large farm or plantation in Lawrence township on the road between Trenton and Lawrenceville, then in Hunterdon, but now in Mercer county, consisting of between 260 and 300 acres on both sides of the

[11]Writ of *venire facias* on file in the cause. See, also, Minutes of Supreme Court, November 16, 1818, page 130.

road. This was the statement of counsel. Investigation shows it to have consisted of exactly 254 acres. The mansion, enlarged and improved, by Benjamin C. White one of its late owners, is still standing, on the left-hand side of the road from Trenton to Lawrenceville, and may be seen after descending the hill upon passing the residence of Mr. John L. Brock and crossing the bridge over the small brook between his and the old Van Cleve place. On the brow of the hill, on the northerly side of the brook, next to the mansion and on the south of it, are built several modern cottages, but the Van Cleve house sits well back from the road and had a small stone ice house on the north side, which has (April, 1927) just been torn down. (See also frontispiece.)

The report of the case is largely taken up with a transcript of the evidence. The references herein made to the report will be to the pages of the second edition.

Much has been said about this case being one concerning land in the county of Hunterdon. The fact is, as already stated, there was no Mercer county at the time this case was tried. Hunterdon county was created in March, 1713-14 (old calendar), and taken from the laws of that year it reads:

"That all and singular the lands, and upper parts of the said western division of the province of New Jersey, lying northwards of, or situate above, the brook or rivulet commonly called Assunpink, be erected into a county, and is hereby erected into a county, named, and from henceforth to be called the county of Hunterdon; and the said brook or rivulet, commonly known and called by the name of Assunpink, shall be the boundary line between the county of Burlington and the said county of Hunterdon.[12]

Mercer county was created by act of the Legislature of 1838, which was nearly twenty years after the trial of this cause. It provided that parts of the counties of Hunterdon, Burlington and Middlesex be erected into a new county to be called the county of Mercer. It ran up the Delaware River from the mouth of Crosswicks Creek to Titusville, and across country, including, as it does, Princeton, Pennington, Hopewell, as far as and

[12] Revision of 1877, p. 200; see, also, Compiled Statutes, Vol. 2, p. 1080, § 18.

taking in the Township of East Windsor, then in Middlesex county.[13] It was afterwards amended as to some parts.[14]

The village now called Lawrenceville was then called Maidenhead, settled in early days by emigrants from a hamlet of that name on the banks of the river Thames in England and called by them for their ancestral abode. The name of the village was changed to Lawrenceville in 1816, by vote of the inhabitants, after Captain James Lawrence had heriocally lost his life on the Frigate Chesapeake fighting against the British Frigate Shannon in Boston harbor in 1813. So that when this case was tried, the land and most of the people were living in what is now Lawrence. The township, which had the same name, Maidenhead, was changed to Lawrence at the same time. In this article, for brevity's sake, I shall call the village Lawrenceville.

Joseph W. Van Cleve lived with his father about twenty years before the latter died, and managed and worked his homestead farm. He continued to live on the farm afterward, and claimed title to it under the former's will, bearing date August 21, 1817. His sisters, Mrs. Stevens and Mrs. Clarke, their husbands joining them, brought suit in ejectment for the possession of one-third each of the farm to which they would have been entitled had their father died intestate, that is, without a will or testament; their claim being that the will, under which their brother, the defendant, claimed, was not duly executed, and, besides, that the testator lacked mental capacity to make it, and that, therefore, the will was void. This suit, as stated, was one in ejectment. But, had it been decided in favor of the fictitious plaintiff, it would have let Mrs. Stevens and Mrs. Clarke, the real plaintiffs, into one-third of the estate each, leaving one-third still the property of their brother Joseph, to whom the will left the whole.

THE OLD ACTION OF EJECTMENT

A word as to the ancient and cumbersome action of ejectment will be of interest here, alike to lawyers and laymen. It is to be observed that this case was entitled *Den* v. *Van Cleve*.

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[13]Revision of 1877, p. 204.

[14]Compiled Statutes, Vol. 2, p. 1688, §§56 and 57.

Now, John Den, as he was named, was a fictitious or non-existent person, and this will be better understood by a description of the proceedings in the common law action of ejectment.

Such suit was brought in the name of a fictitious person, John Den, as lessee, against another fictitious person called Richard Fen, who was described as the casual ejector, alleged to have committed the ouster; that is, putting out of possession the lessors of the plaintiff, the real claimant. Service was made upon the tenant in possession with a notice annexed from the casual ejector, to appear and defend. If the tenant failed to do this, judgment was given by default, and the claimant was put in possession. If he did appear, he was allowed to defend only by entering into a written stipulation called the consent rule, by which he confessed the (fictitious) lease, entry and ouster to have been made, leaving only the title in question.[15] This was the procedure adopted in *Den* v. *Van Cleve*. The tenant mentioned meant the person in actual physical possession of the lands, whether as owner or for a term of years, or otherwise. In this case Joseph W. Van Cleve was the tenant so-called; actually he was in by claim of ownership under his father's will, and the rule was entered ordering that he be made defendant in the stead of the fictitious defendant, Richard Fen, and that he do appear forthwith at the suit of the plaintiff, the fictitious John Den, who stayed in, and file common bail (without security) and receive a declaration, that is, claim for the premises in question by the plaintiff, and forthwith plead thereto, and upon trial of the issue confess the lease (to the fictitious plaintiff), entry and ouster, and insist on title only.

This action obtained and persisted in New Jersey from earliest times down to the adoption of a more rational statute in 1855, called an act concerning ejectment, which provides in its first section that in actions of ejectment all fictions heretofore used are abolished. In *Den* v. *Morris, 2d Halsted's Law Report, page 6 (1823)*, it was held by our supreme court that the lessor of the plaintiff in ejectment must always count upon and show a possession of the land, which need not be by deed (or will); though when without it the claim will be overcome with greater ease. In that case the same Chief Justice, Kirk-

[15]See Bouvier's Law Dictionary (Rawle's 3d revision), Vol. 1, p. 970.

patrick, delivered a long opinion, in which he reviewed very learnedly the action of ejectment at the English common law although he did not give the steps by which the contest was made. He said, at *p. 16,* that all possessory actions are founded upon a peaceable possession in the demandant or plaintiff, and those *under* whom he claims. Now, in the case of *Den* v. *Van Clere,* the deceased Benjamin Van Cleve was the person in peaceable possession and the demandant and lessee of the plaintiffs claimed *under* him. The Chief Justice also said, in so many words, that the action of ejectment is merely a possessory action. And so said Mr. Justice Rossell in his opinion at *p. 22.* He also remarked, at *p. 23,* that in ejectment where the plaintiff, failing in his first attempt, is at liberty to bring a new action, the court generally leaves him to that remedy. That brings me to the assertion that two, and sometimes more, causes were tried in ejectment, by the mere action of the plaintiffs bringing them without leave of the court. This is an anomoly or irregularity, for a judgment, not reversed, is what is called in the law *res judicata;* that is, a thing adjudicated between the parties and those claiming under them, and is conclusive, unless, of course, reversed by a court of competent jurisdiction. All the old books refer to the second or other actions allowed in ejectment suits. In *Adams on Ejectment* (*English work*), *American edition* (*1821*), *page 315,* I find it laid down, "that the judgment can never be final: and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action. The structure of the record also renders it impossible to plead a former recovery in bar of a second ejectment; for the plaintiff in the suit is only a fictitious person, and as the demise, term, &c. may be laid many different ways, it can never be made to appear that the second ejectment is brought upon the same title as the first." And so it appears that a defeated defendant could turn about and sue in ejectment the plaintiff, who had recovered the possession.

Our Legislature, recognizing the impropriety of allowing two or more actions of ejectment at the will of the defeated party, provided in *section 44* of the ejectment act above mentioned that the judgment in an action of ejectment, commenced after the act (1855), shall be conclusive as to the right of possession

and title to the premises, as the same has been established by such judgment. This puts the action of ejectment on a par with other cases, where review is only allowed by leave of the court, such as the granting of a new trial upon cause shown to the trial court, or reversal on appeal. And it will be observed that even now an ejectment action is still a possessory one, as laid down as late as 1917, the Court of Errors and Appeals in *Parrott v. Nugent, 91 N. J. Law Reports, page 203*, then deciding, in an opinion by Mr. Justice Black, that in the trial of an action of ejectment the question at issue shall be whether the plaintiff is entitled to recover *possession* of the premises.

To return to the case: An affidavit was then made by the defendant, Joseph W. Van Cleve, and filed as ground for the granting of a trial at bar, which sort of trial was allowed by order of the court; otherwise the case would have been tried at Flemington, the county seat of Hunterdon, before a single judge at circuit. The affidavit, in the somewhat quainter language then prevailing, was as follows:

"Joseph Van Cleve the Defendant in the above cause being duly sworn on the holy evangelist of Almighty God deposeth and saith that the valne of the premises in dispute in the above cause exceeds the sum of Three Thousand Dollars (the least value for which a trial at bar could be obtained), and this deponent further saith that he doth verily believe that the questions which will arise and be in dispute between the parties in this case are both in point of fact and law abstruse, difficult and complicated, and that the witnesses on his part are numerous and some of them very ancient and infirm which ancient and infirm witnesses all reside within a short distance not exceeding five or six miles from the city of Trenton and more than twenty miles from Flemington, and that none of his witnesses reside near Flemington and all but one near Trenton and the Deponent doth swear that he is informed that the witnesses of the plaintiff do also reside in the same neighborhood with the deponents witnesses and one of them near Flemington, and the Deponent doth swear that such is the crowded state of the town of Flemington during the sitting of

the circuit courts in sd. town and such the size of sd. town and the small number of taverns and boarding houses in sd. town that it will be exceedingly difficult for this Deponent to obtain accommodations in sd. town for those witnesses who are ancient and infirm as will be absolutely necessary for their comfort or will enable him to get the benefit of their evidence if the sd. cause be tried at Flemington and further saith not."

This affidavit was sworn to by Joseph W. Van Cleve before Chief Justice Kirkpatrick. A solemnity that would hardly be resorted to in similar or other like proceedings at the present day. This affidavit was signed by the defendant, Joseph W. Van Cleve, using one word "Vancleve" for his *surname* instead of two, as his father almost always did; thus "Van Cleve." And Vancleve is the style in which the case is reported. Members of the family in succeeding generations have spelled the name in two separate syllables. The spelling of a man's name is entirely arbitrary. I confess to preferring "Van Cleve," and have so written the words throughout this article. In olden times spelling does not appear to have been a fine art.

THE COURT AND COUNSEL

As already remarked, this cause was set for trial before the bar of the Supreme Court, which then consisted of three members, Chief Justice Andrew Kirkpatrick, Mr. Justice William Rossell and Mr. Justice Samuel L. Southard. The judges were then elected by the joint meeting of the two houses of the Legislature.*

The Honorable Andrew Kirkpatrick was Chief Justice of New Jersey from 1803 to 1824, when he was succeeded by Charles Ewing, who was one of the counsel for the defendant in the case. Chief Justice Kirkpatrick had served as an Associate Justice of the Supreme Court from 1797 until elected Chief Justice, or six years. He was a master of the law and a very illustrious man.

The second judge of the Supreme Court was the Honorable William Rossell. He was first elected in 1801, and although

*Constitution of 1776, Article XII.

not a lawyer was an industrious and able judge, whose reported opinions read like those of a member of the bar.

The third member of the court was Mr. Justice Southard. He was elected in 1815 and served until 1821. He was very distinguished in his day and generation, was an able lawyer and served as Governor and Attorney General of New Jersey, United States Senator, and Secretary of the Navy.

As the second phase of this case was tried in the United States Circuit Court for the District of New Jersey, before Mr. Justice Bushrod Washington, a native of Virginia and a Justice of the United States Supreme Court from 1798 until his death in 1829, holding the circuit for the District of New Jersey, this memoir would be incomplete without mention of him. He was a favorite nephew of General George Washington, and devisee of his estate at Mount Vernon. He had great fitness for his high office, and was a man of sound learning and legal ability.

William S. Pennington, a distinguished Jerseyman, sat with Mr. Justice Washington in the case in the United States Circuit Court. He had been Governor of New Jersey; a member of its Supreme Court, and was appointed judge of the United States District Court for New Jersey in 1815.

The counsel engaged in the case on both sides were among the very leaders of the bar in New Jersey, which indicates the thoroughness and ability with which the cause was tried. For the plaintiff they were: Richard Stockton, known as "The Duke," son of the Signer of the Declaration of Independence, of that name. He was not only a leading lawyer but was afterwards United States Senator. General Garret D. Wall, also a leading lawyer, afterwards served as United States Senator, and was elected Governor, but declined. Richard Stockton, Jr., was the son of the senior counsel for the plaintiff. After being admitted to the bar of New Jersey he practiced here for a time very successfully, but afterwards emigrated to the State of Mississippi, where he was made a Judge of the Supreme Court of that State. He later resigned and was appointed Attorney General. He was unfortunately killed in a duel, at New Orleans, in 1827, with John P. Parsons, in which he did not fire at his adversary. A letter found in his pocket afterward disclosed the fact that he did not intend to do so. For the defendant they

were: Lucius Horatio Stockton, another son of Richard Stockton, Signer of the Declaration of Independence. He lived in Trenton, where he practiced law, was a leading member of the bar, but a very eccentric man; he was for a time United States District Attorney for this District. Charles Ewing, who was appointed Chief Justice in 1824 to succeed Chief Justice Kirkpatrick, served until 1832, when he died. He was distinguished as a pleader, advocate and judge, and was a thorough common-law lawyer. Theodore Frelinghuysen was Attorney General of New Jersey at the time of the trial of the cause. He was a very learned man, and afterwards became United States Senator. He was a candidate for vice president of the United States in 1844, the ticket being Clay and Frelinghuysen.

When the cause came to be tried in the United States Court there were some new counsel. Richard Stockton, Jr., had apparently gone South by that time, and the plaintiffs retained William Halsted, Jr., in his stead. He lived and practiced in Trenton and was a distinguished member of the bar. He was official reporter of the Supreme Court (1821 to 1831), and issued seven volumes of reports. The defendant retained the same counsel in both courts, adding Samuel L. Southard to his advisors in the Federal Court, he having returned to the practice of law. He not only sat as a Justice in *Den* v. *Van Cleve* in the New Jersey Supreme Court, but was the reporter of that tribunal as well, and reported the decision.[16]

THE CASE ITSELF

In writing this memoir I have had two minds about the way of putting the case; whether to write the story of the cause proper in the way of a narrative, drawing only upon the evidence, adduced upon the trial, for my facts; or to put forth those facts by quoting succintly the evidence itself and letting the hearer and afterwards the reader (as this is to be published, too) draw his own conclusions from the testimony. Upon reflection, I have concluded to do both; and, therefore, I will now give a narrative of the facts, and will then publish a resumè of the testimony, so that the reader (when it comes to that)

[16] MS. of Richard Stockton, Esquire; Enclyclopedia of Mississippi History, Vol. 2, p. 734-5; also, Elmer's Reminiscenses of New Jersey, 1872.

may form an independent judgment as to whether I have rightly gauged the subject. I shall refrain from reading the testimony when delivering this address, for fear of wearying my hearers, and I shall have no complaint if the readers choose to omit a perusal of the evidence subjoined. Now, as to the case itself.

Major Van Cleve failed perceptibly both in body and mind for several years before his death. Of that there can be no doubt. But still, undoubtedly he possessed testamentary capacity; that is, the power to make a will. This does not require the highest level of thought possessed by the particular individual at any time. A great many people make their last wills and testaments when the mind has considerably retrograded in the decline of life.

The power to make a will only requires that the testator, at the time, "shall possess ability to comprehend those who appear as the natural objects of his bounty, and appreciate the duty which recommends them for consideration." So said Ordinary McGill in the prerogative court in 1891, and this doctrine was applied by Vice Ordinary Ingersoll in the prerogative court in his opinion *In re Williams, 95 New Jersey Equity Reports, page 702 (1923)*, and affirmed by the Court of Errors and Appeals, on the opinion of the vice ordinary, in the same volume, and at the same page. This is the last declaration. Having the ability mentioned, the testator can make the will of his choice.

But, and here's the rub: In or about April, 1817, the testator was afflicted with palsy or paralysis, which rendered his right side helpless, and from thence he was bedridden and spoke but little to the day of his death, August 31, 1817. His mind was also affected, and to considerable extent, especially toward the last. Those who lived with him, and those who knew him well, could, however, understand him, and he understood them.

His daughters, Mrs. Stevens and Mrs. Clarke, were in the habit of visiting him frequently during his last illness. Mrs. Stevens more than Mrs. Clarke, as the latter had children, and the former none. I draw only from the testimony as to all the facts.

On a Sunday, August 3, 1817, Mrs. Stevens came to the house to stay with her father, so that her brother, the defendant Joseph

W. Van Cleve, and his wife could go to church. The family attended the Lawrenceville Presbyterian church. It was some distance away, a little more than a mile.

The morning was cloudy and it rained, and defendant declined to go to church; but Mrs. Stevens *urged* him and his wife to go. They went. Besides Mrs. Stevens, defendant's daughter, Mary W. Van Cleve, then upwards of thirteen, her sister Phebe, eleven, a bound girl of sixteen, a colored woman, and a little colored boy, were left at home. Soon after Joseph W. Van Cleve and his wife had gone, Mrs. Stevens gave the old gentleman two teaspoonfuls of paregoric to make him easy (?), which was double the dose the family gave him. And the effect of this drug, physicians say, is to make one sleep. This appeared to be needed to avert his suspicion, as she apparently intended to go up to a room, over the one where he lay, and take his wills. This might have been a plot to which the parties were Major and Mrs. Stevens; and, maybe, Mrs. Clarke, too. The testimony shows that the defendant accused all three in turn. It promised to be immensely beneficial to them; and in two fell combats before juries in the courts of law, to say nothing of the rule to show cause, they sought, though unsuccessfully, to reap the advantage of the absence of the testaments.

Mrs. Stevens had a workbag with her in which was a bunch of keys. Even if the desk where the wills were kept usually had a key in it, she could not tell what would be the condition that day. Hence probably her keys. Mrs. Stevens told her niece Mary to take her little sister into kitchen and help the colored woman, who was preparing dinner, shell peas, which they did. She never gave such a direction before. In her visits to the house Mrs. Stevens never slept in the room where the wills and papers were kept in the desk drawer. She had slept in other rooms many times. She now went to that room. She was there some time alone. She stayed there until her husband, Major Stevens, came, which was before the defendant and his wife returned from church. They stayed to dinner, but, the rain clearing up, soon afterwards departed.

On Saturday, August 23, 1817, Mrs. Stevens came to the house and stayed all night. On Sunday morning, August 24, 1817, Joseph W. Van Cleve discovered that the wills made by

his father were missing out of the desk, and sent his daughters downstairs to call Mrs. Stevens up to him. She said she would go presently, but was then reading the Bible to her father. Shortly she went up, and her brother charged her with taking the wills. She replied by asking Mary if she had ever seen her at the desk—an evasive answer. Mary was obliged to say, and answered truthfully, that she never had seen her there. Not long after, Major Stevens came to the house, and said to defendant: "It was a will of your own making, and it is foolish to charge us with it, for you can't prove it." They were angry and left the house. Apparently the only natural thing they did at that time.

The day after Major and Mrs. Stevens came to the house and she took her father's hand three times and each time he withdrew it and laid his hand upon his breast and groaned heavily. Significant of what he thought!

Two days after the execution of the will of 1817, Mrs. Clarke came to the house. She said she would swear her sister, Mrs. Stevens, never took the wills. Later, when accused by defendant, she replied: "I don't care if I did; it was no more than you would have done, if you had had the same chance."

A reading of the testimony shows some discrepancy among the witnesses in some rather unimportant matters; but as to controlling circumstances, the main thing, they were in general and substantial agreement, and not contradictory. This is generally the case. To err is human. When witnesses agree in everything, even to the minutest particular, there is ground for suspicion that the story is artificial and has been concocted.

We come now to the execution of his last will by the testator on Sunday, August 24, 1817, as he lay paralyzed on his bed in his last sickness. He had previously made two wills, one in 1809, in which he gave his landed property to his son Joseph, and one in 1814, when he did the same thing. In the will of 1809, he gave his daughters money legacies; in 1814 he reduced them. His son, who got the land, would have had to pay them in order to exonerate his estate. They were not great. The will of 1814 was written by testator himself from a memorandum furnished for the purpose by Charles Ewing, Esquire, his counsel. That was the will he desired should stand. The one of

August 24, 1817, the new one—the will in dispute—was made by executing the memorandum, after filling up certain blanks. This was done by defendant with testator's knowledge and assent. What happened was this: His son announced to the testator that the house had been robbed and someone had stolen his wills; he was greatly agitated, and said, "Who, who, who?" The defendant replied that it was some of his children, he supposed, and that there was a copy of his will written by Mr. Ewing, and did he wish to execute it? He replied that he did. Then the near neighbors, Mr. and Mrs. Phares, were hastily sent for. Johnson, the sailor, was already in the house. Joseph W. Van Cleve read the draft of the will over very distinctly, and, as he went along asked testator if he understood the will. The Major paid very particular attention, and replied, "Yes, very well." Asked if it were a copy of the will he had made in 1811, he replied, "yes, it was." And then, with the pen in his left hand, which was guided by John Phares, at testator's request, he signed the document. Asked if it was his last will and testament, he answered, "Yes," in a low tone, and then, raising his voice, said, "Yes, I do." Told he had to acknowledge the will he put two fingers on the seal and said: "I acknowledge this to be my last will and testament." Two of the witnesses state that; Mary Van Cleve and Stephen Johnson; two other witnesses, Mr. and Mrs. Phares, do not state so much; apparently not remembering it. Upon executing the will, testator took Mr. Phares by the hand and then sank back exhausted. He declined steadily and passed away a week afterwards.

And thus ended a life full of years, of usefulness and of honor!

The trial lasted eight days, and, at its conclusion, the *Trenton Federalist* newspaper printed the following comment. The files of the *True American* are missing from the State Library for that time, and I am consequently unable to print any comment it may have made. This is the *Federalist's* article:

> "The important cause of John Den on demise, of Dr. Israel Clarke and wife, and of Major John Stevens and wife, against Joseph W. Vancleve, which was decided at the late term of the Supreme Court, excited greater public attention and interest than is common. This trial

commenced on Monday the 16th instant, by a short opening, on the part of the plaintiffs, by Richard Stockton, Esq., their attorney on record. On the same day the defendant opened his defense at considerable length by L. H. Stockton, his attorney on record, and the time was principally consumed until Friday night by the examination of witnesses on both sides, which was very tedious, as the question principally related to the capacity or incapacity of Benjamin Vandeve, Esq., at the time when he executed his last will. The will was set up by the defendant, his son, against the plaintiffs, who claimed as his daughters and heirs-at-law. An important question on the admission of certain evidence was argued on Thursday by L. H. Stockton and Theodore Frelinghuysen (Attorney General) for the defendant, offering the evidence, and by Richard Stockton, junior, and Garret D. Wall, for the plaintiffs, objecting to the evidence. The court admitted the evidence. The cause was summed up to the jury on Saturday the 21st, and Monday and Tuesday the 23d and 24th inst., by G. D. Wall and Richard Stockton, senior, for plaintiffs, and by Charles Ewing and Theodore Frelinghuysen, for defendant. The Jury, on Tuesday afternoon, rendered a verdict in behalf of the defendant confirming the will of his father, whereby the real estate of the father was devised to the defendant, his son. The jury was a struck jury and was respectable. The defendant moved for judgment *nisi*, &c., on the verdict, and the plaintiffs moved for a rule to show cause, on the first day of the next term, why a new trial should not be had. The arguments on both sides indicated zeal and fidelity of the counsel for their respective clients."

And now for the enlightenment of those who choose to read a compendium of the evidence of the more important witnesses, taken from the report of the case, I subjoin the following. It is by no means all of the testimony given to the court and jury; its entirety would prolong this paper beyond all reasonable limits. It, however, fairly sets forth the character of the evidence given, and shows that there was testimony on both sides.

To be fair is to state the facts truly, and to be fair has been the intention.

THE EVIDENCE

This action in the New Jersey Supreme Court, as already stated, was tried by a struck jury at bar in November, 1818, before Chief Justice Kirkpatrick and Justice Southard; Justice Rossell not sitting. (Case, p. 695.) Some account of the testimony given by the witnesses on both sides is as follows:

Major John Phillips was called by the plaintiff. He testified to an intimate acquaintance with Benjamin Van Cleve for fifty years, during which time he had lived on, claimed and possessed as owner, the premises in question, containing between 260 and 300 acres; that he left him surviving three children, Phebe, one of the lessors, who married John Stevens thirty-one or thirty-two years ago and had no children; Elizabeth, another lessor, who seven or eight years before had married Dr. Israel Clarke; and the defendant, Joseph, his son; that he left no personal property though he once owned a pretty large one.

The defendant then called the following witnesses:

John Phares, one of the subscribing witnesses to the will, made a deposition before Justice Southard; and it was read, Phares being then dead. He said the will was executed about ten o'clock on Sunday morning, the day it bears date (August 21, 1817). It was read to testator by defendant, Joseph W. Van Cleve (his son), audibly and distinctly, and being asked if it was his will and a true copy of a former will which he had made and which was missing, he answered to both questions, "Yes, it was." With the pen in his hand in the presence of the subscribing witnesses, he, with the aid of deponent, who, at his request steadied his hand, wrote his name to the will. Mr. Phares asked him if he acknowledged that to be his last will and he took hold of the paper and laid his fingers on the name and seal and replied, "Yes," in a low tone of voice; and then, raising his voice he said, "Yes, I do." The witnesses (Mr. and Mrs. Phares and Stephen Johnson) signed in the presence of the testator and of each other, no other person being present except defendant's family. Witness conversed with the testator that morning only about the will. He could only speak two or three words at a time and only answered questions. (Case, p. 697.)

Mehetable Phares, wife of John Phares also a subscribing witness, saw the testator and subscribing witnesses sign the will in the presence of each other during church time on the day it bears date. Defendant (Joseph W. Van Cleve) mentioned to testator that his wills were missing. He roused up as from a deep sleep and asked who took them. Defendant replied, "Some of his children, he expected." Defendant told him there was a copy written by Mr. Ewing (afterward one of his counsel in the case) and asked if he wished to execute it. He said, "Yes, he did." Phares wes sent for, Johnson was in the house. Defendant read the will over distinctly to testator and as he went along he asked him if he understood it. He paid very particular attention to every part of it and answered, "Yes, very well." Asked if it were a copy of the former will he made in 1811, he answered, "Yes, it was." He appeared to be of sound and disposing mind and memory and capable of making a will or deed disposing of his land, and understanding what he was doing and knowing whether he was satisfied with it, though not capable, from his speech faltering and from weakness of his body, of expressing or dictating it all at one time. He had been struck with the palsy in April or May preceding (1817), and from that time his right side had been helpless, so that he lay all the time in bed, and wrote with his left hand. He died on the Sunday following, August 31, 1817. (Case, p. 698.)

Stephen Johnson (a working man, sometimes a sailor), on the day the will was executed, was passing with a bundle in his hand, by defendant's house, from New York to Philadelphia. Defendant asked him if he would hire, and he employed him. After he had breakfast he was asked to come near and notice what was said. He saw the testator and witnesses all sign the will in the presence of each other. Testator laid his hand on the seal without direction and acknowledged it to be his last will and testament. Witness never saw him except at that time, but believed he knew well enough what he was about, and to be sound enough, as to his understanding, to make a will. He lay on his bed, and as witness went in defendant told him his wills had been taken out of the house. Testator asked by whom, defendant said he supposed by one of his children. There was a copy written by Mr. Ewing, and asked if he wished to execute

that he replied, "Yes." Defendant then asked him if he should read it to him; he said, "Yes." Defendant read it and asked if he were sensible that it was a copy of the will he had formerly made. He said, "Yes." Defendant told him to speak out so that the people could hear him. He exerted himself and said, "Yes, I say so." Phares asked him if he should guide his hand: he reached out his hand for the pen; it was delivered to him and Phares steadied his hand; he put his two fingers on the seal and said: "I acknowledge this to be my last will and testament." He reached out his left hand and took hold of Mr. Phares' hand, and witness left the room. It was about eleven o'clock. (Case, p. 700.)

The plaintiff then called the following:

Andrew Reeder, whose deposition had been taken *de bene esse,* a legal expression meaning conditionally, that is, to be read if he could not attend; if he could he was obliged to be present and testify in person.[17]

I would disgress a moment to say that a great many depositions were taken in this case before Mr. Justice Southard of the Supreme Court, a thing unheard of in this day. In these busy times of the court all such testimony is taken before a master in chancery or other officer. But in this case the Justice himself actually went to the farm of Mr. Reeder and took his deposition. It will be interesting to note that the Justice himself certified the fact. The deposition commences in this way:

> "Be it remembered that on the ninth day of July A. D. eighteen hundred & eighteen, at the house of Andrew Reeder, Esq., in the Township of Lawrence in the County of Hunterdon, previous notice having been duly served on the Defendant, as appears, by the acknowledgment of the Defendant & his attorney, of the time & place of taking his Deposition, in the presence of the parties & their Attornies, before me Samuel L. Southard, Third Justice of the Supreme Court of Judicature of the State of New Jersey, personally appeared Andrew Reeder, Esq., a witness very sick & infirm, as appears from personal view & observation of him the said Andrew Reeder, &

[17] See Tayler's Law Glossary, p. 82.

was duly sworn according to Law, to speak the whole truth and the said" &c.

He testified that he witnessed a will executed by testator in 1814, and although he had then failed somewhat as to his memory, more than his understanding, he might be considered of a disposing mind. At that period the news from Europe was interesting and he was anxious always to get his papers and would talk of the news, quote passages pretty accurately, and knew market prices tolerably well. Some doubt existed in defendant's mind as to the propriety of his making a will arising from the situation in which he lived with his son on his own place, going to his son's table, and the advantages his son enjoyed, and seemed entirely under the sovereignty and control of his son. But deponent made up his mind to say that at the time of making the will of 1814 he was of disposing mind. Defendant added that he knew his father's head was fuddled and his memory had failed a good deal, but he attributed it to the immoderate use of tobacco, and he had taken him into town to get a lawyer to draw his will and had kept him from tobacco for two or three days. After the signing of this will Benjamin Van Cleve's mind failed rapidly until in a year, or perhaps less time it was very feeble. His conversation was very foolish and had no sense in it. A few days after his burial, defendant (Joseph W. Van Cleve) came to deponent's house to see deponent and said to him: "Have you heard what has taken place in our family? Father's will was lost, somebody took it away," and added that his sister, Mrs. Stevens, must have stolen it, that he discovered it the Sunday (August 24, 1817) before his father's death, and went to his bedside and in a loud tone of voice said: "Father, somebody has robbed the house." It seemed to startle him very much and with a considerable struggle he said, "Who, who, who?" though he had not spoken for some time before, raised himself up, stretched out his right hand and pulled him toward him. He seemed a good deal agitated, but after a few moments sank again into his former feeble, weak state. In 1814 when deponent signed the will as witness he then thought, and still thought, that Benjamin Van Cleve was of disposing mind, fit to make a will if no improper influence were made use of towards him; that the will was signed in the pres-

ence of deponent, his nephew, Charles Reeder, and his wife, whose names were put to it as witnesses. Deponent was perfectly satisfied that for at least one whole year before the death of Benjamin Van Cleve he had not mind and memory sufficient to make a will to dispose of his property with reason and discretion or to manage it in a proper manner. (Case, p. 702.)

Jonathan Doan had a conversation with Stephen Johnson, who said he came from sea through New York and was going to his parents below Philadelphia; that he was called in on the road to witness the will of an old man by the name of Van Cleve, and that there would be a law suit after his death as he was not capable of making a will; he could not speak so as to be heard unless you put your ear close to his mouth, "and *he'd be d——d if he could hear what he said when he acknowledged his will,*" (*Italics* from the text in report) and thought the son made it to suit himself. Witness met Johnson after he had been sworn in the case, and being told by him what he had sworn to, witness said he had told two stories. (Case, p. 706.)

James Brearley, Jr., lived about three-quarters of a mile from testator, and knew him from infancy. Sunday night before his death witness and Richard Henderson went to the house about dusk and sat up with him until sunrise, wet his mouth and sometimes helped him to drink; he was frequently awake but seemed from his appearance as if he had no recollection and could not move without assistance, unless, perhaps, it was his left arm. He thought he did not know his son Joseph. (Case, p. 708.)

Rev. Isaac V. Brown was acquainted with testator and his family since 1809, when he became pastor of the congregation in Lawrenceville (Presbyterian Church); visited him a few days after he was struck with palsy, which occurred between the 10th and 15th of June, 1817, and found him in bed in a very low, reduced and impaired situation; thought testator knew him; leaned over him and in a loud tone of voice spoke to him at some length on the subject of religion, stating some of those principles of Christianity which were most deeply interesting, and of extreme importance to him in his situation; he several times inclined his head and signified that he concurred in what was said; he uttered a sound which deponent did not

understand, but his daughter, Mrs. Stevens, informed witness that he understood it very well and said, "Very true, all very true," and they appeared like those words; witness was satisfied that he did understand what was said to him; he was capable of understanding simple, but not intricate, things, and could understand the important truths communicated to him at that time. Witness kneeled by his bed and made a prayer but doubted whether he could follow him in his rapid way of expressing himself. Once witness went into his room but he lay asleep and under the influence of paregoric, which he sometimes took. After the stroke witness did not think him capable of disposing of a large estate in a perfect manner; but if the disposal of his property, which he had previously contemplated, and which had been familiar to him, had been proposed to him, he would have known and remembered it, and, if it had not agreed with his mind, he would have refused to execute it. (Case, p. 711.)

Thomas Stevens, brother of one of the lessors (Major Stevens), brother-in-law of John Phares, in August, 1817, after the will was signed, both before and after testator's death, talked with Phares about it. Witness asked Phares what he thought of testator and if he considered him capable of making a will. He said he did not look upon his as capable of any kind of business or conveying away his property either by will or deed. Witness did not recollect certainly what he said in answer, but believed it was that he did it by the request of testator's son. Witness told him that he should not have done such a thing; that he might as well have taken hold of a dead man's hand. (Case, p. 713.)

Mrs. Sarah Smith, sister of Mrs. Phares, lived within a half mile of testator, saw him two or three times after he was taken down and sat up with him on the night he died, and the Sunday preceding, and then ministered to him like a child. Never spoke to him nor heard anyone, nor heard him speak; he lay on his back and appeared insensible and did not know her so far as she noticed. She considered the conduct of defendant and his wife toward the testator reasonable, prudent and proper; they always seemed attentive and kind to him. (Case, p. 714.)

Plaintiff rested his evidence.

L. H. Stockton, for the defendant offered Ralph Lanning, and other witnesses, to prove that the testator at sundry times, and many years before his death, in 1809, and at other periods, declared to them that it was his intention that his son Joseph, the defendant, should, after his death, own and enjoy all the landed property of which he should die possessed; that to effect this purpose he had made a will, devising it to defendant; that he gave his reasons for so doing, and what those reasons were; and that these declarations were uniform and continued as long as he was capable of speaking.

This evidence was objected to by counsel for the plaintiff, as inadmissible before the jury.

The objection was elaborately argued by R. Stockton, Jr., and Wall, for the plaintiff. L. H. Stockton and Attorney General, for defendant.

Southard, J., expressed the opinion of the court, and declared the evidence admissible. To this opinion the counsel of the plaintiff prayed a bill of exceptions, and it was ordered.[18]

Evidence for defendant.

Edmund Roberts, a little before John's death (John, son of testator died in 1802) had a conversation with testator about learning. He was then, and long before and after, a member of the Legislature, a man of high standing in society. He had given a part of his farm to John, and told witness that he had given John an education (he was a graduate of Princeton College and a lawyer), which would be more valuable to him than so much fast property, and he intended to give Joseph the farm on which he lived. Witness had a conversation with him about two years before his death, and the last summer (1814) of the late war (1812). At first he did not know witness; they conversed about an hour. He spoke of what had happened in the Revolutionary War, and in the Legislature, and appeared to have his memory perfectly about ancient matters, and whenever anything was presented to his mind he understood it fully. His judgment was very bright and accurate. He told his daugh-

[18]The exception was to dissent from the ruling of the court, so that plaintiff could appeal by writ of error; such an appeal was, and is, entirely different from a rule to show cause why a new trial should not be granted, which is always taken by leave of the trial court and argued before it.

ter to bring something to drink, asked witness to drink, and to call and see him again. (Case, p. 716.)

Ralph Lanning. Testator informed witness several years before that he was going to "give it all to his son Joseph," and in reply to witness's question why, he said that Dr. Clark had plenty of land and so had Major Stevens, that Joseph should take the land and pay his two sisters (he left them small legacies); and that witness had better not break his farm, but give it all to one of his sons. (Case, p. 716.)

Henry Cook had known testator for forty years, when he commanded a company at the battle of Long Island. Witness's farm adjoined his. He told deponent that he meant to keep his farm as long as he lived, and Joseph might have it. But did not mention his daughters. (Case, p. 717.)

Charity Smith was sick, and her deposition, taken by Justice Southard, was read. It stated that she was the grandmother of defendant's wife; was eighty-one years old; had for thirty years been a near neighbor and intimate acquaintance of testator. Testator said to witness that Dr. Clarke was the richest man in the neighborhood and able to support testator's daughter (his wife) without giving him anything; that Stevens (married to his other daughter) had no child and had property enough, if he took care of it, and it was needless to give him any more; that his daughters were both well fixed and he intended his son should have the farm. She had a perfect recollection of a conversation which took place between defendant and his sister, Mrs. Clarke, on August 24th last. Defendant said to Mrs. Clarke: "My father's will is gone and some of you have taken it away." She replied she could take her oath that Mrs. Stevens had not taken it. Defendant said: "You know who has got it." She replied that she herself had not got it. Defendant said: "Some of you have it and you know who it is." She replied she did not care, it was no more than he would have done if he had the same chance. She added that she knew her father had given Joseph the land in all the wills and intended him to have it, and they did not want his land; that Mrs. Clarke was in a violent passion, shook her fist at deponent and raved and abused deponent and defendant and his wife very much. She (Mrs. Clarke) told deponent that Joseph said

she (deponent) was a drunkard; that she did not care who called her a drunkard, it was not true, and good conscience was better than a thousand witnesses. Mrs. Clarke also told her grand-daughter, Chatty (defendant's wife), to hold her tongue and not say so much, as she would repent it. (Case, p. 718.)

Frazee Ayers, in consequence of his marriage with the sister of defendant's wife, had been acquainted and visited in the family since 1804. In 1809 testator told witness that defendant, Joseph, would have the whole farm together, that he had made his will and left the rest to him; had given a small legacy to each of his daughters. Witness thought the sum so small for his large property that he turned and looked at him; he then said that his daughters were very well married and would not want any more; that Joseph had been at all times with him on his farm and he intended to give it to him; that he was obliged to make up a considerable sum of money for a sheriff for whom he was security and who had been in default, and that Joseph had helped him pay the money. (Case, p. 720.)

Samuel L. Southard, one of the Judges, said he took the deposition of John Phares, who was weak and could with difficulty relate what he had to say; that very few questions were put to him, but he detailed the answers as they were taken down; that the deposition is nearly, or quite, in his own words, perhaps more nearly than any deposition witness ever took. (Case, p. 722.)

Stephen Johnson was recalled. Did not remember that he ever said that the will was made by the son and not the testator, nor that he was in his dotage; but did believe that he was in his reason on the day the will was signed and did make the will. (Case, p. 723.)

Mary W. Van Cleve, between fourteen and fifteen years old at time of testifying, was the star witness in the case, and I give her testimony from the report in full:

"*Mary Van Cleve,* daughter of the defendant, between fourteen and fifteen years old. Heard Mrs. Clarke repeatedly say that defendant and his wife must have a great deal of trouble with testator, and never heard any intimation of neglect or ill-treatment from anyone, until after the wills were missing. During testator's sickness, Mrs. Stevens frequently came to the house,

and sometimes she stayed three or four days. The first part of the time she brought her clothes in a band-box, the latter part, in a small trunk, which she always took with her when she went away. When she brought the trunk she had with her, in her work-bag, a bunch of four or five keys, on a ring the size of a dollar, with a spring catch to it, which witness believed belonged to Dr. Clarke, because, in the month of March preceding, during one of the visits, of about a week, which she made to her Aunt Clarke's, she had seen precisely such a one in the doctor's bookcase; took it down and examined it, and gave it to his little girl to play with; and, though she had visited often at her Aunt Stevens' and seen her keys, she had never seen such a ring there, nor anywhere else. This ring she saw in Mrs. Stevens' work-bag, in the latter part of the month of June, when she had been sent by her to get something for her out of the bag. Doctor Clarke was testator's physician, and, in the first part of his illness, came there frequently, as often as twice a week, but in the latter part not so often. Witness heard him say that he had not been there in five weeks before the will was missed. He gave no reason for not coming, nor did witness know any. Doctor Clarke was generally, but not always, there when Mrs. Stevens was, but when they did meet there, they almost always went into the parlor and had a private conversation. Witness saw them leave testator's room and go into the parlor together as many as three or four times. Defendant's wife wished Mrs. Stevens to stay with her father on the 3d of August, being the third Sunday before the will was executed, so that defendant and wife might attend church. Mrs. Stevens agreed to stay with him on that day, and came there on Saturday evening. The morning being bad, defendant declined to go to church, but Mrs. Stevens urged him, and he and his wife went at the usual hour, which was about half-past ten o'clock. Witness and her sister, who is about twelve years old, a bound girl, a black woman and Mrs. Stevens were left at home. A little black boy was there also, but not in the house. Soon after defendant was gone, Mrs. Stevens gave testator two teaspoonsful of paregoric, which was double the dose the family frequently gave him to make him easy. She then shut the door of his room and went upstairs, into the room over him, where

there was a bed, and a desk in which defendant usually kept his papers locked up. As Mrs. Stevens came into that room, witness came out of it and left the door open, nor did witness know whether Mrs. Stevens shut it. It had no lock and was directly opposite to the landing at the head of the stairs. Mrs. Stevens, when she lodged in the house, slept in several rooms, but never in that one. She stayed in that room until Major Stevens came to the house, which was about an hour before defendant and his wife returned home. It was raining when he came, and he drove his chair into the chair-house. He usually had his horse taken out, but he declined it on that day, both before and after defendant returned. When he came up, the black boy was standing at the door, and he asked where his master was. The boy told him he was at church. He then asked where the children were, and was informed. Mrs. Stevens came downstairs to meet him, and told witness to go with her sister into the kitchen and help the black woman shell peas, which witness did, and remained there until her father and mother returned from church. The black woman had charge of getting dinner, and Mrs. Stevens never before gave witness such a direction. Major Stevens and his wife stayed to dinner, and immediately after, as soon as the rain cleared up, went away. Major Stevens said he had been at Doctor Clarke's the night before, and came from there. The conduct of Mrs. Stevens on this day did not, at the time, strike witness as singular, or induce her to suspect anything, nor did defendant inquire about it, nor did witness mention it, until about a fortnight after defendant complained that the wills were lost. When defendant did inquire, she told him about it, but did not then, or at any time tell him, nor anyone else, that she saw Major Stevens or Mrs. Stevens at the desk. Late in the fall, previous to testator's death, defendant and witness were in the room over where testator lay in his last illness, and where the desk was in which defendant kept his papers. Defendant had the desk open, and Abigail Coulter came up and informed him that some person wanted to see him. He went down, and then Abigail Coulter asked witness to look in the desk for her indentures, and see how old she was, and when she would be out of her time. Witness did look, and upon opening one of the

drawers, saw two papers folded up and sealed, and endorsed, as she believed, in testator's handwriting. The upper one was marked, 'Benjamin Vancleve's Will of 1811.' The under one, 'Benjamin Vancleve's Will of 1809.' Abigail Coulter could not read writing, and asked witness what they were. Witness informed her they were grandpa's wills, and hearing defendant coming up the stairs, they left the desk.

"Mrs. Stevens came to defendant's the day before the will was executed and stayed all night. In the morning defendant discovered that the wills were missing out of his desk, and sent witness's sister downstairs to call Mrs. Stevens up to him. He also directed witness to go down; and, as she was going down the stairs, she heard her sister ask Mrs. Stevens to go up to defendant, and Mrs. Stevens replied that she would, presently; that she was reading to *her father, the testator, in the Bible.* (*Italics* from text in report.) When she went up, defendant charged her with taking the wills. Soon after this, Mrs. Stevens asked witness if she had ever seen her at defendant's desk, and witness told her no; for witness never had seen either her or Major Stevens at it. Soon after this conversation Major Stevens drove up, and Mrs. Stevens went into the yard to him, and when they came in, Major Stevens said to defendant, 'It was a will of your own making and it is foolish to charge us with it, for you can't prove it.' They were angry at being charged with taking the wills, and left the house about eight or nine o'clock, which was one or two hours before Mrs. Phares came, and the will was executed. Stephen Johnson had come to the house before breakfast, and was there at that time. Mrs. Phares called on her way to church and was asked in by defendant's wife. Mr. Phares was sent for by defendant. Defendant read the will over to testator, and asked him if he could understand it. He said, 'Yes.' Defendant asked if it was not a true copy of his last will. He said, 'Yes.' Defendant told him to speak loud so that the witness could hear him; he raised his voice and said, 'Yes, yes, I say so.' Defendant asked him if he wished it executed; and he said, 'I do.' Mr. Phares asked him if he should guide his hand when he wrote his name; he said, 'Yes.' Mr. Phares or defendant, witness did not recollect which, said it would be necessary for him

to acknowledge it. He then put his finger on the seal and said, 'I acknowledge this to be my last will and testament.' He then took Mr. Phares by the hand and shook it, and seemed to be very much exhausted. Witness could not say whether it was hard for strangers to understand him when he spoke, but, being well acquainted with him, she understood him perfectly, and did so when the will was executed. During all his last sickness, until the Friday before his death, he was capable of speaking, of asking and answering questions, and often called to Mrs. Clarke, and asked her why the doctor did not come to see him. He had the possession of his understanding after the attack, and when the will was executed, as he had before. On Monday, the day after the execution, Mrs. Clarke came, and in conversation with defendant, said, 'Let who would have taken the wills, she would take her oath her sister Phebe never took them.' She also asked witness what the testator said the day before, and witness replied, 'He said enough.' The next day Major Stevens and wife came to the house and went in to see testator. Mrs. Stevens took hold of his hand three several times, and he drew it away each time and laid it on his breast, and groaned very hard. Witness never heard such groans. The next day but one, Mrs. Clarke came again. Mrs. Charity Smith was there and high words passed between her and Mrs. Clarke, and the defendant's wife. Defendant told Mrs. Clarke that she took the will; she replied, 'I don't care if I did; it was no more than you would have done if you had had the same chance.' Defendant told her she knew that testator had given him his land in his wills. She replied, 'I know it, and we want none of your land.' He asked, 'Then, Betsy, what do you want?' To this she made no answer.

"In 1811 witness saw testator write a will, and after it was done, her little sister asked him what he would give her. He told her he would give her something; that he had given her pa the farm, and he expected, after her pa's death, that her little brother, Benjamin, would have it. Witness told Mrs. Clarke and Mrs. Stevens that testator had made a will, soon after it was done, in 1811.

"After Mr. Potts had been to see testator, witness heard defendant tell Mrs. Stevens that Potts had been there about the

Monmouth property, and that testator had expressed a wish, in his will, that none of his children should call on Potts about it. She said that testator had always told Mr. Stevens that he intended that property for his children." (Case, pp. 725-729.)

Abigail Coulter, between sixteen and seventeen years of age, said that in the fall before testator died she asked Mary Van Cleve to read her indentures to her. In looking for them, Mary opened a drawer and took up two large papers, which witness supposed to be letters, and asked what they were. Mary said they were her grandpa's wills. A few Sundays before testator died, and when Mrs. Stevens was at defendant's, Major Stevens came; it was raining and he drove his chair into the chair-house. Witness was standing at the end of the house, where he did not see her, and as he came near the door he asked a little black boy, belonging to defendant, where his master and mistress were. The boy said, "Gone to meeting." He asked, "Where are the children?" The boy said, "They are at home." He then went into the house and was there until after dinner. Mary was, part of the time, before her father and mother returned, in the kitchen, shelling peas. On a Sunday, some time after this, witness heard defendant and Major Stevens talking about wills, and Major Stevens said, "It is foolish to accuse us of taking the wills, for you cannot prove it." Witness never saw Major Stevens in the room where the wills were, nor ever told anybody that she did see him there. She never saw anybody take the wills. (Case, p. 729.)

William Hamilton, who had known testator since 1788, on the Sunday after testator's burial was sitting with defendant and his wife in the entry of their house, and defendant said that when he missed the wills he sent his eldest daughter to call his sister, Mrs. Stevens, up to him, and when she came he was standing at the desk, and her countenance seemed as if she knew what she was sent for, she looked guilty and condemned, and took her seat on the bed. He said to her, "What devilish thing, Phebe, is this you have been doing; you have been taking my father's wills out of the desk." She denied it. He continued to charge her with it and she burst out crying, and went down stairs and met Mary and asked her if she saw her at her father's desk when defendant went to meeting, and Mary answered, "No,

aunt, I did not see you at the desk." Defendant said that there was nobody about but the children and they were playing and knew nothing of it and had no interest. His wife told him that Mrs. Stevens had a bunch of keys and she suspected something wrong and was afraid she meant to take her father's wills. He replied, "My God, you do not suppose people would steal." But now he thought if he had taken his wife's advice he would still have had the wills. (Case, p. 730.)

Thomas Ivins, in November and January last saw defendant at Burke's tavern, where many people were in and out, and had a talk with Mr. Burke and others about the loss of the wills. He told a long story about it which witness could not well recall, but remembered that he said he was certain in his own mind that his sister, Mrs. Stevens, took it; that she had a bunch of keys there which he thought ought to have been home where her husband was. (Case, p. 733.)

Mrs. Sarah Reeder, wife of Andrew Reeder, had long been acquainted with Charity Smith, and very intimate with her for five or six years past; she was upwards of eighty years old, and rather remarkable for her superiority of intellect for her time of life. She always stood high for her sense of truth, and witness never in any way heard her truth called in question. (Case, p. 735.)

Major John Phillips. The whole farm was said to lay for 251 acres, and was so given to the assessors, but witness supposed there were between 270 and 300 acres, and that it was worth $60.00 or $65.00 per acre. The house, barn and principal improvements were put on by testator more than twenty years ago. Joseph had brushed it up some and put on a crib and some small improvements; he had no property independent of his father. (Case, p. 737.)

Charles Ewing, Esquire, one of the counsel for defendant, said that in 1811 defendant brought to him a will of some years precedent date and informed him that testator wanted some alterations made so as to guard against claims of his daughters to the Monmouth property. Witness made a draft according to the instructions and directed defendant to get his father to copy it; that the will in dispute is the draft witness made. (Case, p. 738.)

Dr. Nicholas Bellville had not seen testator while he was sick, and could speak of his situation and disease only from representations of witnesses. Understood that one side was inanimate and he lay several weeks incapable of speaking. If this was so, his mind must have been destroyed so that he could not dispose of his property; his disease was in his head and brain. An affection of the palsy may be partial, but where the head is affected it generally affects and deranges the mind; there were exceptions to all general rules, but it would be a strange exception if Benjamin Van Cleve had any considerable share of mind left; that his living a considerable time is no evidence that his mind was not affected. (Case, p. 738.)

Joseph Bullock attended court as a witness for defendant. About five or six weeks after testator's death he called to see defendant, and defendant said that his sister Phebe had taken the wills. Witness said he did not want to hear anything about it, it was a serious piece of business, and asked him if there were any keys lying about that she could use. He replied there was a closet key which would open the desk and which she knew as well as he; that he had called her upstairs and accused her, and her countenance betrayed her, and he was sure it was her; about a month or six weeks after this witness called again and defendant then said that he was certain Phebe was clear, but that the Major had done it, and that he had told Mr. Stockton so; that he could not actually prove that he took it but could prove by the girls that he had been seen at the desk, and since he had found it out they did not make such a racket about it. Witness was in the habit of visiting at testator's, and was well known to him, and called there about a year before his death; witness told him his (witness') father had been dead about a year; when about to go away testator told him to tell his "daddy" to come and see him. Witness had a curiosity to see how testator's judgment was and asked him what he thought of his horse, and if he would trade. He said no, he left all those things to his son. Witness asked testator the age of his horse; he examined his mouth and told his age very exactly. Witness supposed if testator had paid him $100.00 he would have forgot it in a few moments and paid it over again. His memory had altogether failed. (Case, p. 739.)

Richard Stockton, Esquire, one of the counsel for the plaintiff, testified that the first week in March defendant came up with him in the road and said, "Mr. Stockton, I told you that my sister had taken the wills; I have altered my opinion, and I now believe it was Major Stevens who did it." (Case, p. 740.)[19]

The report proceeds:

The testimony on both sides being closed, the cause was very ably and eloquently summed up to the jury. Wall opened for the plaintiff; Attorney General and Ewing answered for the defendant, and R. Stockton replied for the plaintiff.

Before the argument was finished, Justice Southard left the court to attend a distant circuit.

The Chief Justice directed a constable to be sworn to attend the jury without charge; but the counsel for the plaintiff expressing a strong desire for a charge, he did in a few words state the law applicable to the case.

The jury found a verdict of not guilty (that is, for the defendant), whereupon R. Stockton, for the plaintiff, moved for a rule to show cause why the verdict should not be set aside, and stated several reasons. (Case, p. 740.)

The argument on the rule for a new trial was had at the February term (1819), by R. Stockton and Wall, for plaintiff. L. H. Stockton and Ewing for defendant. The reporter regrets that the length of the report is such as to forbid inserting the whole arguments. (Case, p. 742.)

As it is, the epitome of the arguments reported occupy eighteen pages, 742-761. And then follow the opinions of the members of the court on the rule to show cause why a new trial should not be granted.

First, is the opinion of Kirkpatrick, Chief Justice. He said that the trial lasted many days; a great number of witnesses

[19]The names of the witnesses in the cause, other than those whose testimony is given in full and in epitome above, are as follows:

Maturin Redway	John Potts	Miss Ann Brearley
Perrine Castner	Henry Van Cleve	Daniel Cook
Richard Hendrickson	Capt. Amos Hutchinson	Laban Dickinson
Elizabeth Phillips	Joseph Scudder	Charles Brown
Waters Smith	Mrs. Rachel Coulter	Mrs. Elizabeth Brown
Mrs. Barsheba Smith	Mrs. Hannah Davison,	Rebecca Reed
Mrs. Ruth Stevens	John Davison	Dr. Joseph Phillips
Jasper Smith	Gideon Smith	Charles Reeder
Robert Phares	Thomas Ivins	
Samuel Hunt	Mrs. Catherine Ivins	

were examined on each side; the testimony was summed up by counsel with much ability; the jury retired from the bar in a measure without advice of the bench, and after a deliberation of four or five hours, returned with a verdict for defendant. (Case, p. 762.) He quoted Lord Mansfield (Chief Justice of England), and said that he had shown that a new trial is just as necessary in actions of ejectment as in other cases; that the old objection against granting new trials in ejectment, because another action may be brought, had been overruled again and again. (Case, p. 763.) Defendant's counsel cited two cases from Pennsylvania. The learned Chief Justice here takes a fling at Pennsylvania law. After saying that one of these cases does not apply, and that the other is reported with insufficient accuracy to show its direct bearing, he says:

"Besides, it is well known that the people of Pennsylvania have a jurisprudence of their own, probably imposed upon them by the imperfections of their juridical system, which would but ill comport with the great principles of the common law by which we are governed. Certain it is that if we were to take up the decisions of all the states, founded as they are upon local customs, colonial necessities, and legislative innovations, and attempt to make them the rule of adjudication here, we should not only disfigure and break down the ancient temple of justice, in which we so much glory, but pile up in its place a mass of broken fragments, without symmetry, form or beauty." (Case, p. 771.)

On the question of the steaming of the wills the Chief Justice made this observation: "The defendant wholly failed, there being nothing in it to raise even the slightest suspicion either against Phebe Stevens or her husband, who, it seems, had been accused, in turns, of this atrocious deed." (Case, p. 773.) When discussing the weight of the evidence he referred to the minister's testimony as follows: "When the minister of religion, in whose cure he was, called to visit him, he spoke to him, but he did not answer; he prayed with him, but he did not understand; he opened to him his duties and hopes, but he gave no assent, except that at one time he thought he perceived an inclination of the head; and though this holy man seemed to think that this pastoral visit, this devotional exercise and this

consolatory advice, might have been soothing and refreshing to his soul, yet this inclination of the head was the only sign from which it could be collected, and even of that he was in some degree doubtful." (Case, p. 777.)

He gives a good character to Charity Smith, who had been traduced by Mrs. Stevens. He says: "Charity Smith, I think a very aged and very respectable lady, a near relation of defendant's wife, and also Mary Van Cleve, the defendant's daughter, say that during this period the deceased did speak so that he could be understood by them, but to what amount or to what effect, particularly, they do not say. Now, however difficult it may be to reconcile what these witnesses say on this matter, with the rest of the testimony and with the condition of the deceased, as it appeared to others, yet, as they are persons of irreproachable character, and have sworn it, it must be admitted that he had some knowledge of those continually with him, and could distinguish one from another; that he had some sort of articulation and could utter some words, at least, so as to be understood by those around him. And this, I believe, is all they have sworn." (Case, p. 778.)

He concludes as follows: "After a trial so laborious—so expensive—before a jury so upright, so intelligent, so discerning, selected for the very purpose, it is with great reluctance as well as with great diffidence that I have brought myself to this conclusion. But yet, upon the most careful review of the whole case, I am constrained to say that I think the court was mistaken in the admission of evidence; that I myself was mistaken and deficient in not giving the whole properly in charge to the jury, and that the jury was mistaken, either as to the construction of the testimony or the point upon which they placed their verdict. And for these causes, in my judgment, the rule for setting aside the verdict must be made absolute." (Case, p. 782.)

Then follows the opinion of Rossell, J., a layman, a most excellent judge, and one who wrote very well. He said, among other things: "In the present case, however debilitated and reduced in mind and body old Mr. Van Cleve might have been when he executed the will in question, three witnesses have solemnly sworn that he was in possession of this necessary soundness of mind and memory—two of them his near neigh-

bors, in the habit of intimate acquaintance and frequent communication with him in sickness and in health, and beyond even an expressed doubt capable of fully understanding the nature of the oath administered to them, and without a whispered suspicion of the integrity of their hearts or character. This testimony was also corroborated by that of several others, and the verdict of the jury has demonstrated that they believed them." (Case, p. 785.)

He further stated that as to the verdict being against the charge of the court and the weight of the evidence: "The chief justice, in charging the jury, gave an explanation of the necessary soundness of mind of a testator, to enable him legally to dispose of his estate, and left it to the jury, on the whole evidence, to say whether this will was executed by Benjamin Van Cleve when in possession of that important qualification of mind, or not. In the exercise of their constitutional powers they have passed their verdict on this question. And, in a case like the present, I am unwilling to disturb that verdict and change the situation of the parties." (Case, p. 785.)

Mr. Justice Southard concluded the deliverance on the question of a new trial in his opinion. Among other things, he said: "The defendant offered to prove that for many years before his death the testator had declared his intention of giving this land to the defendant, and that he had executed two previous wills to carry this intention into effect. This evidence was objected to, but admitted; and this admission gives rise to the present reason. And, before a more particular examination of it, it will be proper to remove out of our way certain ideas and difficulties which do not properly apply to it, but which were interposed in the course of the argument. This evidence was not offered as proof of a will of Benjamin Van Cleve in order to carry the lands, nor to supply the absence of written will. The law is satisfied with nothing short of a written will, executed with all the formalities prescribed in the statute. No parol evidence can possibly supply its place. Nor did the court understand the defendant as offering it with that view. He had presented a written will in legal and competent form, and executed with due solemnities, provided the testator possessed a disposing mind. It was in reference to that mind alone, and

as rebutting the plaintiff's allegations and proofs, that this evidence was offered and considered competent." (Case, p. 788.)

Of the deposition of Andrew Reeder he says: "This deposition contains proof of the existence of the will of 1814, and an account of its *contents*, and seems to me, therefore, to legalize the subsequent evidence of the defendant respecting them." (Case, p. 793.)

He also said: "Where opposing and contradictory evidence has been given, I am aware of no safer rule than to take that exhibited by the party in whose favor the verdict is rendered, examine it by itself, and if it be of such character and amount as, uncontradicted, fully, fairly and completely to justify the conclusions of the jury, then to let the verdict stand. The jury may have disbelieved the opposing testimony, and they are to determine whether they will disbelieve it. But if the evidence in favor of the verdict leaves it at all questionable, and the opposing evidence is strong and clear, the court ought to interfere and relieve the injured party. In the case before us the defendant, who is in possession of the verdict, produced a will purporting to be executed with all legal formalities. In support of this will the three subscribing witnesses all swore that the testator heard it read, assented to its correctness, and executed it as and for his last will and testament; and that, when he so executed it, he was of sound and disposing mind and memory, competent to perform the act, and then gave their reasons for their belief. Now, two of these witnesses were well known, of unblemished character and unimpeachable veracity, and the third, though poor and wandering and a stranger, I saw no conclusive reason to disbelieve. Other witnesses united with these as to his capacity, and detailed facts to corroborate their opinion." (Case, p. 791.)

And he concluded by saying: "I have only to add that I have seldom investigated a cause with greater anxiety to arrive at the truth; and if in the result which I have reached I have fallen into error, it has not been for want of ample aid to assist my inquiries. The rights of the parties upon the argument received an elucidation which could not have been sur-

passed at any bar. I think the rule to show cause ought to be discharged." (Case, p. 796.)

Thus ended the case in the New Jersey Supreme Court. And Joseph W. Van Cleve rested upon his double victory, won once before the court by the verdict of a special jury, and once before that court itself on rule to show cause why a new trial should not be granted. He might well have hoped he was at peace, but peace eluded his grasp; for the plaintiffs, availing themselves of an absurd principle of law, then prevailing, brought a second ejectment, as they were permitted to do, even though they had lost; and the court had refused to grant them a new trial. I can understand their dislike of the courts of New Jersey.

They then went to the United States Circuit Court for this District. As the files of this case in that court of that early date have been mislaid and cannot now be found, I cannot speak from the papers; but there must then have been diverse citizenship, acquired by Mrs. Stevens, the lessor of the fictitious plaintiff there. She removed to some foreign State and made a lease to the illusive John Den, alleged to be of that place, wherever it was; and then brought the case in the United States District Court for New Jersey.

THE CASE IN THE UNITED STATES COURT

This action came on to be heard at the April term, 1822, before Mr. Justice Bushrod Washington, Justice of the Supreme Court of the United States, and William S. Pennington, District Court Judge, who, in virtue of that office was judge of the circuit. Mrs. Clarke undoubtedly stayed home and parted with her alleged one-third interest in the real estate left by her father, to Mrs. Stevens, who had moved out of New Jersey, to enable her alone to become the lessor of the plaintiff and thus give the United States Court jurisdiction and although the case is reported as *Stevens* v. *Van Cleve,* in *4th Washington's Circuit Court Reports, at page 262,* &c., the title really was, and is shown by that report to be, *Den, ex Dem. John Stevens and wife* v. *Joseph W. VanCleve.*

The plaintiff in this case, again a fictitious individual, claimed one-third of the land in controversy, in right of the female

plaintiff as one of the heirs of Benjamin Van Cleve, and one-third part under a deed from Dr. Clarke and wife, the latter being also a daughter and one of the heirs at law of the deceased. The defendant was the son of the deceased, as before, who claimed the whole of the land under the instrument purporting to be the last will and testament of his father, Benjamin Van Cleve, executed Sunday, August 24, 1817, as stated.

The Federal court restricted the cause to the validity of this instrument, which, it was contended by the plaintiffs' counsel, was not executed according to the requisitions of the laws of New Jersey; and, that Benjamin Van Cleve, at the time he executed the will, was not of sound and disposing mind and memory. (U. S. Case, p. 263.)

During the trial, the defendant's counsel offered evidence to prove that the original will, executed by the testator in 1814, when his capacity was not questioned, had been purloined by Mrs. Stevens, the female lessor of the plaintiff. But the court held that such evidence was improper, as it was not pretended by the counsel that they meant to prove the contents of that will, and to rest their defence upon it. On the contrary, they relied altogether, as they avowed, upon the validity of the will executed on the 24th of August, 1817; and, consequently, the question respecting its validity could not in any manner be fairly affected by the evidence offered in respect to the will of 1814; that the only tendency of such evidence would be to prejudice the minds of the jury, and to lead them from the question which they had to decide. The defendant's counsel also offered evidence to prove that the uniform declarations of the testator in favor of the defendant, from the year 1802, had been consistent with the disposition made of his property by the will of 1817. (U. S. Case, p. 265.)

The court held, on this point, that the general rule of law was against the evidence, and no case had been cited showing an exception to it, unless when it was offered to repel a charge of fraud, or circumvention by the devisee (person to whom land was devised or given) in obtaining the will; but that in this case, the plaintiff's counsel disavowed any intention to impute to the defendant a charge of that sort. And the evidence was therefore inadmissible. (U. S. Case, p. 266.)

Mr. Justice Washington summed up and charged the jury that the only point of time to be looked at by them, at which the capacity of the testator was to be tested, was *that* when the will was executed; that the testator may have been incapable of making a will at any time before, or after that period; and the law permitted evidence of such prior and subsequent incapacity to be given: but, unless it bore upon that period, and was of such a nature as to show incompetency when the will was executed, it amounted to nothing. (U. S. Case, p. 268.)

Here evidently resides what, in the cant phrase of the day, is called "the milk in the cocoanut." The Stevenses and Clarkes had already had one inning before a jury, and they had doubtless found that to accuse Joseph W. Van Cleve of having imposed a spurious will upon his father, in other words, committing "fraud," did not pay; that a jury of the vicinage had rather resented such an imputation, especially in the circumstances; and so they preferred to rest their case in the United States Circuit Court upon a legal theory, which would appeal more strongly to the judges than the jury, namely, the capacity of the old gentleman mentally to make the will of 1817, and, also, physically to execute it properly. And this proposition, now taken by the plaintiff, was the reason for the United States Circuit Court refusing to allow the defendant to prove the purloining of the earlier wills, and that testator had always consistently declared that he intended to leave his landed property to his son. Of course, the court had been informed by plaintiff, in opening the case, what was intended to be proved. Plaintiff's counsel stated in that court, they did not intend to charge fraud against Joseph W. Van Cleve. They had already suffered enough for that temerity on the first trial.

And let me here for a moment digress to say that this will of 1817 was never probated. Nor does any will have to be. If a testament is withheld from probate, any person interested in the will may cite its possessor to lodge it for probate in the proper office.[20] But if a man has a will in his pocket giving him certain property, he may retain it, and if attacked in court with reference to title to property which it gives him, he can prove it, as required by law, and offer it in evidence and rely

[20] Bracher's Case, 60 New Jersey Equity Reports, page 350.

upon it on the trial. The old law books contain numerous such cases; and I know of a case in the court of chancery in my time in which reliance was placed upon an unprobated will: for I was concerned in it.

There was no special jury in this court; and those returned by the marshal, who were sworn as jurors, were:

Samuel Holcomb	Moses Smith
Aaron Mumm	James Wood
Isaac Nichols	Ezekiel Whitehead
James Brown	Oliver Wade
James C. Vandyke	Jacob K. Mead
Luther Goble	John Mumm

The learned judge concluded that if, in the opinion of the jury there were irreconcilable contradictions in the evidence, so that the state of the testator's mind could not be as the plaintiff's witnesses deposed it was before and after the 24th of August, and that he should be competent to make his will on that day, they would then have to weigh the credit of the witnesses,[21] to inquire into their respective capacities to form a correct judgment upon the matters about which they had deposed, and to compare the *opportunities* of judging correctly which were offered to the witnesses on the one side and the other. The jury found for the defendant. (U. S. Case, p. 270.)

But this victory, glorious as it was to Joseph W. Van Cleve, (whose sister never carried the case farther), his family and his friends, was barren after all. The expenses were so great that he was compelled to mortgage the property for a considerable sum, and lost it later to strangers, as has already been said. It has never since been possessed by any member of the family.

From what has been observed, it will be seen that Mr. Justice Washington, Judge Pennington concurring, took the view that

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[21]The witnesses on both sides sworn upon this trial were: Major John Phillips, Mehitable Phares, Andrew Reeder (deposition), Catherine Smith, Sarah Smith, Richard Hendrickson, James Brearley, Jr., Elizabeth Phillips, Col. Erkrine Beatty, Gideon Smith, Bersheba Smith, Ruth Stevens, Waters Smith, Hannah Stevens, John Davison, Hannah Davison, Cornelia Davison, Thomas Stevens, Walter Smith (deposition), Dr. John Van Cleve, Rev. Isaac V. Brown, Samuel L. Southard, Charity Smith (deposition), Charles Ewing, Jesse Coleman, Daniel Cook, Mary Van Cleve, Luke Howell, Abigail Coulter, Lucius H. Stockton, Stephen Johnson (deposition), Edmund Robert, Capt. Amos Hutchinson, Perrine Castner (deposition), Sarah Reeder, Charles Reeder, Israel Stevens, George Rossell, William Hamilton, Jonathan Dear, George Brearley, Joseph Bullock, Dr. Bellville, John Potts.

testimony tending to show the theft of the wills of 1809 and 1814, and, also, the declarations of the testator for many years that he intended to leave the land to his son to the exclusion of his daughters, was inadmissible, because the plaintiff did not intend to charge fraud as was done in the Supreme Court case. It must, however, have been a great satisfaction to have the second jury find the capacity of the old gentleman to make the will of that memorable Sunday morning, upheld, and that upon that single question, without its being complicated with any charge of fraud. The jury in the State court had had that question before them; and their verdict for defendant on the issues, as has been seen, was upheld by the Court.

REFLECTIONS OF THE AUTHOR

When, as a boy, I was first told of the will of Major Van Cleve, and of the devise of his lands to his faithful son who stayed home, and who, with his family, took care of him for the last quarter of a century of his life, I waxed exceedingly wroth. I imagined that the testator and his son were *paragons* of virtue, and his daughters, who sought to destroy and overthrow the will and injure their brother for their own gain, were *ogresses*, and their husbands, who aided and abetted them, were *ogres*. This feeling, I am free to confess, persisted until, growing older, I had access to law books, and I said to myself that the case was important and must have been reported. I looked through the Digest of decisions and soon found it. I well remember spending an entire Sunday (I had little other leisure) in carefully reading over the 100-odd pages of the case, and for the first time it dawned upon me that it really was a close one—one upon which reasonable minds might differ as to the capacity of the testator to make the will of 1817, when he was suffering from a paralytic stroke; when his mind had become enfeebled and had to be directed to the execution of the testament; when he answered questions only with a nod and principally in monosyllables, and his hand had to be guided. But I never could, and do not now, see how the conclusion that there was no testimony whatever that Mrs. Stevens or her husband, more probably the former, purloined the wills, can well be doubted. And I am utterly at loss to understand Chief Justice

Kirkpatrick's expressed views of the situation; and this, upon the evidence presented in that case. I judge it solely by that evidence. It certainly warranted such a presumption; and presumptive evidence is often very strong.

The proof was that the wills of 1809 and 1814 were missing, and, consequently, they were not produced in the trial in the Supreme Court. Mary Van Cleve and Abigail Coulter saw them in the desk the fall before the old gentleman died. Mrs. Stevens was in the house August 3, 1817, sent the girls who were present into the kitchen, which she had never done before, and went up into the room where the wills were kept, also a thing she had never done before. After that mysterious visit the testaments were missed. I refer to the very great interest she had in their removal.

Yet, Chief Justice Kirkpatrick said that defendant wholly failed, there being nothing to raise even the slightest suspicion against Phebe Stevens or her husband, who were accused in turn of the atrocious deed; and yet he said that he thought Mary Van Cleve a person of irreproachable character. She it was who testified to circumstances that pointed quite conclusively to facts leading to the inference that either Mrs. Stevens or the Major abstracted the wills that day. And there were others who told of equivocal statements made by the Stevenses and Clarkes about the disappearence of the wills.

Let me here state that if Chief Kirkpatrick had said that the contention that Mrs. Stevens or her husband or either of them, had stolen the wills, was against the weight of the evidence, or was without sufficient evidence to support it, I would not complain that he had made an unwarranted declaration; but to say, as he did, that there was nothing to raise even the slightest suspicion against them is, in my judgment, unsound. Remember, this fact from the testimony, while inferrible only, was from Mary Van Cleve; and from other witnesses, who spoke of equivocal statements made by certain parties suspected and accused, and from facts and circumstances arising out of the case, which spoke for themselves. To say that the charge of abstracting the wills was against the weight of the evidence, or was without sufficient evidence to support it, can be asserted by anyone who may incline to that view. I certainly do not. Suppose the

case went up to the court of errors and appeals on writ of error, instead of to the trial court on rule to show cause, I think no judge of the court of appeals would have said there was no evidence to support the judgment. And here, I think, I should state the difference between a rule to show cause why a *verdict* should not be set aside and a new trial granted, and a writ of error whereon the court may reverse for error in law in the *judgment* entered on the verdict, to the same end. The two courts are governed by somewhat different rules, which I shall not stop to detail. The first of them reviews, namely, on a rule to show cause which is granted by the trial court, as to why the *verdict* should not be set aside; the second is carried up to the court of appeals where for legal reasons a *judgment* entered upon a verdict may be reversed. In the latter, the court of appeals, can reverse the judgment, remit the record to the court below, and order it to grant a new trial. The advantage of a new trial granted by either court is that when it comes on again the law of the case, so far as raised and passed upon, is settled for the new trial; but, of course, errors may be committed on the new trial, even those which were the subject of the rule to show cause, and which the court of appeals may later review. It was entirely different in the second or other trial of ejectment under the old practice where the parties brought a suit *de novo* without any new trial being granted by the court, and where, consequently, nothing had been settled, but everything was still open, and, by the by, left open. This anamaly has happily been abolished.

The other two judges of the Supreme Court did not mention the matter in terms on the rule to show cause, but reviewing the case, each said in his opinion that *all the evidence* was for the jury, and the jury believed that adduced on behalf of the defendant. And that included the testimony of Miss Mary Van Cleve, the testator's grand-daughter, and of Abigail Coulter, the bound girl. Let it be remembered that these witnesses had told no conflicting stories, were in nowise impeached, and were of good character for truth and veracity.

In those old days there was very little personal property; everything was real estate. And the man or woman possessed of a goodly farm was rich indeed. The old law books are full

of ejectment suits; the later ones practically of none. Litigation today consists principally of disputes about personal property, accident suits figuring largely in the class; and the latter were nearly unknown in the old days, because the fields of activity were much less diverse. There were then no steam car, trolley or automobile accidents, for there were no such conveyances. This will sufficiently illustrate the point.

The farm in question was estimated to be worth $12,000.00, one-third of which, or $4,000.00, was a prize well worth contending for. Two-thirds, or $8,000.00 being the goal, if the plaintiffs were successful. Think what it amounted to, to them, in those days!

Some may wonder why neither Joseph W. Van Cleve nor Mrs. Stevens nor Mrs. Clarke were witnesses. Had they been, much valuable testimony probably could have been given. Could the Stevenses and Clarkes, and especially Mrs. Stevens, have withstood a cross-examination on the abstraction of the wills? The truth is, they could not be witnesses. The old law was so unreasonable as to exclude every *party* to a suit from being a witness. It was not until 1859 that an enlightened Legislature removed the disability and provided that (with certain exceptions not necessary to be mentioned) no person should be disqualified as a witness by reason of his or her interest in the event, but such interest might be shown for the purpose of affecting the witness's credit. Today, and during the life of the present generation, we have practically no such disqualifying law, which seems very properly to us to be absurd and unjust. The last disabilities against criminal defendants and prejurers having, in more recent times, been swept away, leaving discredit, of course, as a feature in such circumstances.

Now, the plaintiffs had a motive to have the wills out of the way. And that is a cogent factor in every case in which the conduct of parties comes into dispute. Of course, only the fact, and no motive for the fact, need to be shown. But, if there be any doubt about the fact itself, motive, if shown, is a strong corroboratory factor. Here there was ample reason for Mrs. Stevens and Mrs. Clarke to desire the wills removed out of the way, so that they could come into an inheritance which would not otherwise be theirs. If the old gentleman had died

intestate, that is, without a will, the son and the two daughters would have inherited one-third each of their father's farm, as his heirs-at-law. And the testator, as so many testators do, could have made a will leaving each an equal share, or nearly so, and thus have practically adopted the statute of descent, the law which provides how real estate shall be divided, when the owner makes no will. But, in the present case, the reason for making a will, and the kind of will which the testator did make, were present in ample measure.

He had a son who had, with his family, lived with and taken care of the old gentleman; his two daughters were married and had moved out from under the parental roof-tree; their husbands were well to do. Mrs. Stevens had no children and her husband was prosperous. Mrs. Clarke had several children, and her husband was one of the richest men in the neighborhood. There was every reason why Benjamin Van Cleve should make the wills he did—in favor of his son.

The first will, that of 1809, left a larger pecuniary legacy to the daughters. Five years after, in 1814, the testator made another will, leaving them less money. There were reasons. Times had changed. The daughters and their husbands were doubtless better off. The son was doubtless in a position where there was more occasion to protect him. He was growing older and had a growing family, among other things. And, besides, he would have had to pay any money legacies to his sisters in exoneration of the real estate left to him. The sufficiency of such like considerations were for Benjamin Van Cleve.

Furthermore, as bearing on the motive attributable to the daughters of the testator, sisters of defendant, to say nothing of their husbands, was the fact that there was no suggestion that anyone else had taken the wills of 1809 and 1814. There was no proof that anyone had broken into or entered the house, or stolen anything, except the *wills*. Any casual burglar would have stolen gold or silver, *something of value to him*, not wills, which would do him *no good*.

Of course, this awful clash of family interests, exposed to the vicissitudes of lawsuits in the courts of New Jersey and of the United States, extending over a period of over four years, and very expensive, could do nothing but estrange relatives, to

say nothing of the mutual aspersions made upon each other by them, and the cross-swearing of some relatives on the witness stand.

Mrs. Stevens died childless, and Mrs. Clarke's children became to the Van Cleve descendants unknown. Much less, simply living apart, separates many families, until the existence of each other becomes forgotten lore. It appears to be an immutable law of nature.

CONCLUSION

Further comment seems unnecessary. I shall content myself with saying in conclusion what I said in the beginning, namely, that the case was a very interesting one. The judges who presided over the trials were the most distinguished of jurists; the counsel were the very leaders of the bar of New Jersey, and as was said by one of the justices in concluding his opinion on the rule to show cause: "The rights of the parties upon the argument received an elucidation which could not have been surpassed at any bar." The testator was a distinguished man, not only in his own community, but in the State at large; and his daughters reflected no credit to themselves in the unnatural litigation which they commenced,—and *lost*.

Of course I am interested. I am interested as one of the family; I am interested as a member of the legal profession; I am interested historically. I have drawn only on the record,—now upwards of a century old,—and have stated the facts disclosed by it. I have no feeling: personally, I accuse no one, and only point out the testimony and circumstances of the case from which it may be inferred that the wills were purloined, and who purloined them. This is certain: That justice at last triumphed, but at great cost of treasure, family estrangement and bitter disappointment to the losing side.

And in taking leave of the subject I feel like exclaiming with the noble Lord Bulwer:

For Justice all place a temple and all season summer!